Supreme Court, U.S.
FILED

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

TOWNSHIP OF NORTH BERGEN, NEW JERSEY,

*Petitioner,*

—v.—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and THE NEW JERSEY STATE CONFERENCE, NAACP,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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67 pp

## QUESTION PRESENTED

This case presents a substantial issue of public importance with respect to the interpretation and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (k)(1)(A)(i) ("Title VII"): Specifically, may the courts below properly fashion a remediation plan, with the stated purpose of eliminating disparate racial impact on African Americans, but which effectively mandates reverse discrimination in municipal employment against residents of the Township of North Bergen, New Jersey?

## LIST OF PARTIES

The National Association for the Advancement of Colored People, and The New Jersey State Conference, NAACP were plaintiffs in the District Court and appellees/cross-appellants in the Court of Appeals.

The Township of North Bergen, New Jersey was a defendant in the District Court and an appellant in the Court of Appeals.

The State of New Jersey, Department of Personnel was a defendant in the District Court and filed an Appearance form but did not file a brief or participate in oral argument before the Court of Appeals.

James McLarnon, Daniel Peschetti, Toni Anne Rodriguez, Pedro Luis Rodriguez, Eddie Somick, Walter Somick, Pete Ruts, Jim Cowan, Christopher Seliga, Robert Farley, John Shearstone, Pete Giunchini, Lou Romano, Thomas Ferrari, Tushar Patel, Gregory Deacutis and Richard Castellito were each intervenor-defendants in the District Court, and filed an appearance as an appellant, joing appellant North Bergen's brief, but did not argue in the Court of Appeals.

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## OPINIONS BELOW

On March 19, 1996, the Hon. Maryanne Trump Barry issued an Opinion (Pet. App. 18) and Order (Pet. App. 15), invalidating North Bergen's residency requirement[1] for the hiring of municipal employees on the basis of disparate impact on the surrounding area's African American population, in alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (k)(1)(A)(i).[2]

On November 5, 1996, the District Court denied North Bergen's application to add several large surrounding municipalities[3] with similar residency requirements as parties to this action, thereby preventing a fair and "global" remediation plan, which would have provided equal public sector employment opportunities for North Bergen residents. (Pet. App. 13)

On November 20, 1996, Judge Trump Barry issued a Decree (Pet. App. 5), establishing a remediation plan for the express purpose of expanding employment opportunities for African Americans, but with the concomitant effect of eliminating municipal employment opportunity for North Bergen residents based on the existence of residency requirements in many of the communities in the surrounding labor market.

On October 15, 1997, the Court of Appeals issued a summary affirmance of the District Court determinations. (Pet. App. 1)

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[1] New Jersey statutory law permits municipalities to impose a hiring practice based on residency. N.J.S.A. 40A:9-1.3. (Pet. App. 20)

[2] On March 26, 1996, the District Court Judge entered an Order, deleting the last sentence of the carryover paragraph on page 9 of her Opinion (Pet. App. 24), striking the provision which held that the burden of persuasion remained with plaintiffs/respondents in rendering the analysis required by 42 U.S.C. § 2000e-2(k)(1)(A)(i). (Pet. App. 17)

[3] Petitioner sought to implead the municipalities of Newark, Orange, East Orange, Bloomfield and Irvington. (Pet. App. 13)

## STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals for the Third Circuit was filed on October 15, 1997. (Pet. App. 1) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Petitioner Township of North Bergen requests that this Court interpret the following provisions of Title VII of the Civil Rights Act of 1964 and its amendments, 42 U.S.C. § 2000e *et seq.*:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .
>
> § 2000e-2. Unlawful employment practices
>
> (k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .

## STATEMENT OF THE CASE

On January 20, 1995, plaintiffs/respondents The National Association for the Advancement of Colored People and

The New Jersey State Conference, NAACP, (collectively "NAACP" or "respondents") filed suit in the United States District Court, alleging, *inter alia*, that defendant/petitioner Township of North Bergen ("petitioner" or "Township" or "North Bergen") had engaged in a racially discriminatory practice through enactment and implementation of a hiring preference for Township residents in public employment. (Pet. App. 34) North Bergen first imposed a residency requirement, Ordinance No. 1825-76, for public employment in 1976, requiring all Township employees to be "bona fide residents" of the municipality.[4] (Pet. App. 20)

Upon respondents' Motion for Summary Judgment, Judge Trump Barry determined to permanently enjoin North Bergen's residential preference practice in municipal hiring, based solely on a statistical finding of disparate impact on the area's African American population, in violation of Title VII, 42 U.S.C. §§ 2000e-2(a) and 2(k)(1)(A)(i). (Pet. App. 5, 18, 25-28) Disparate impact is defined as a "facially neutral employment practice [which] may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." *Wards Cove Packing Company, Inc. v. Atonio*, 490 U.S. 642, 645, 109 S.Ct. 2115, 104 L.Ed.2d 733, 744 (1989)

In rendering her determination in favor of respondents, the District Court Judge "compared the racial composition of employees in the position in question with the composition of those in the 'relevant labor market.' " (*Id.* at 24) *Wards Cove*, *id.* at 650; 104 L.Ed.2d at 747; *Newark Branch, NAACP v. Township of Harrison, New Jersey*, 940 F. 2d 792, 798 (3d Cir.

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[4] Because New Jersey law prohibits the imposition of a residency requirement as a condition of continued employment for municipal police officers and firefighters, N.J.S.A. 40A:14-9.1 and -122.1, Ordinance No. 1825-76 does not apply to these departments. (Pet. App. 21) Residency requirements for North Bergen's police and fire departments are set forth in Ordinance No. 544-94, which requires residency as of the date of appointment of police and fire candidates. (*Id.*)

1991) Judge Trump Barry found that the demographic distribution of North Bergen is approximately 50-51% Caucasian, 42% Hispanic, 2-4% Asian, and 1-2% African American, based on available 1990 Census data (*id.* at 19), and compared this with the percentage of African Americans in North Bergen's municipal work force, .55%. (*Id.* at 25) The court below then compared the distribution of African Americans in the full-time municipal work force in Hudson County,[5] 19.4%, (*id.*), and with North Bergen's "private, non-municipal work force," 8.4%. (*Id.* at 26) Applying these statistics, the court below concluded that the disparity in African American employment was "most likely caused by a force other than pure chance." (*Id.* at 27)

Holding that North Bergen had proffered insufficient objective evidence to demonstrate that its residency requirement for municipal employment was "job related for the position in question and consistent with business necessity," 42 U.S.C. § 2000e-2(k)(1)(A)(i), the District Court enjoined enforcement of this employment practice and directed the parties to confer to fashion an "appropriate remedy for the discriminatory effect of North Bergen's residency requirement," consistent with the *Harrison* decision. (Pet. App. 33)

When the parties were unable to agree on an appropriate remedy, the court below filed its Decree on November 20, 1996. (Pet. App. 5) Most significant to this appeal is Judge Trump Barry's finding in the Decree:

> Importantly, and statistical disparity aside, plaintiffs have not alleged even the specter of racism on the part of the Township of North Bergen in promulgating and enforcing its residency requirements and preferences and, presumably for that reason, counsel for plaintiffs stated at the final oral argument in this matter that plain-

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[5] North Bergen is one of 12 municipalities which comprise Hudson County, New Jersey. (Pet. App. 19)

> tiffs' objective is to ensure that North Bergen's employment opportunities are available to all. . . .
>
> There being no allegation and, certainly, no evidence that the statistical disparity seen here is the result of any prior discrimination against African Americans or that race was a factor in who could or could not apply for municipal positions, there is no discrimination based on race to remedy and a race-based remedy would, therefore, be not only unnecessary but wholly inappropriate. . . .

(Pet. App. 6) (Citations omitted.)

Thus, the court below, in addition to invalidating the residency requirement and vacating all existing lists of eligible applicants for municipal employment compiled by the New Jersey Department of Personnel, determined to effect a recruitment process and reporting requirement of new hires and terminations based on residency and job classification for a five year period, holding that

> Such a requirement will enable North Bergen to demonstrate that its history of enforcing residency requirements and preferences—the only cause of disparate impact alleged in this case—is no longer deterring non-residents from applying for employment with the township, and that any unlawful effects caused by that history have been remedied.

(Pet. App. 10-11)

Judge Trump Barry specifically declined to impose a reporting requirement based on race, reiterating that a race based reporting requirement would be wholly "inappropriate." (*Id.* at 10)

## LEGAL ARGUMENT

### THE REMEDIATION PLAN SHOULD BE REMANDED TO THE DISTRICT COURT TO ELIMINATE ITS REVERSE DISCRIMINATORY EFFECT ON NORTH BERGEN RESIDENTS.

The remediation plan imposed by the District Court is fatally flawed because it impermissibly harms the rights of innocent third-parties, i.e., the residents of North Bergen, who now must compete with non-residents for municipal jobs within the Township while, simultaneously, being foreclosed from obtaining employment in surrounding municipalities with exclusionary residency requirements. (Pet. App. 5) *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203, 223 (1987). Thus, by reason solely of residence, North Bergen's population is placed at a severe competitive disadvantage to job applicants in surrounding municipalities with residency preferences. This, by definition, constitutes reverse discrimination. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996)

Petitioner moved to join some of the surrounding municipalities with residency requirements to establish the District Court's jurisdiction for the purpose of granting reciprocal employment rights to North Bergen residents in those communities. If, for example, a Newark resident may apply for municipal jobs in both Newark and North Bergen pursuant to the Decree, then simple fairness and equality require that a North Bergen resident be permitted to apply for a municipal job in Newark, notwithstanding the application of Newark's residency requirements to other non-residents.[6] By denying that Motion, the District Court declined to join

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[6] This argument applies equally to the other municipalities which North Bergen sought to implead before the District Court: Orange, East Orange, Bloomfield and Irvington, New Jersey.

parties necessary for the implementation of a fair and reciprocal remedy.

It should be noted that North Bergen has not sought to invalidate Newark's residency requirement in its entirety. The Township merely seeks to carve out an exception, based on reciprocity for North Bergen residents. Petitioner does not challenge the District Court's obligation to remedy the effects of disparate impact. It simply requests that this remedy not create a further wrong, i.e., reverse discrimination.

Joinder of these additional municipalities remains necessary to provide complete relief to all parties, as well as to all present and future applicants of all races, and to ensure the existence of a "level playing field" within the relevant labor market. Petitioner sought a more precisely tailored remediation plan, to preserve the rights of all North Bergen residents, including members of the municipal Hispanic community, as well as seeking to increase the number of African Americans in the Township's employ. Under the reciprocity remedy urged by petitioner, non-residents of North Bergen may compete for public jobs in North Bergen so long as a corresponding municipality provides reciprocal opportunities to North Bergen residents. Failure to provide this reciprocity creates, not eliminates, discrimination in employment opportunity by bestowing multiple employment opportunity on some, at the expense of diluted job opportunity for innocent North Bergen residents. This inequality is anathema to the principles of fair employment opportunity on which Title VII is based.

The Decree imposed by the District Court disproportionately affects another protected class who reside in North Bergen in substantial numbers, Hispanics. (Pet. App. 7) In the matter at bar, petitioner compiled a factual record of the employment practices of surrounding municipalities, the racial impact of those practices on Hispanics, and an itemization of municipalities with residency requirements. (Pet.

App. 41 and 44) Yet, the court below effectively ignored this data in fashioning its remediation plan.

That the District Court understood the negative effect of its ruling on North Bergen's substantial Hispanic community is demonstrated by the following inclusion in the Decree:

> This court cannot ignore the fact—and fact it be—that what this case is all about is the impact *not* of discrimination against one group of non-residents but the impact of residency requirements applied equally against all non-residents. To order that discrete relief be specifically targeted only at African Americans will result in fewer job opportunities for other racial and ethnic groups, most particularly Hispanics. This court will not give with one hand only to take with the other, particularly given its obligation to consider, among other factors, the impact of relief on the rights of third parties. *United States v. Paradise*, 149, 171 (1986).

(Pet. App. 7) (Footnote omitted.)

Nevertheless, the trial court's remedy failed to ameliorate the harsh impact on the Township's Hispanic population.

Discrimination, in any form, is repugnant in a civilized, fair society. As held by this Court in *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943),

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality . . . [and] racial discriminations are in most circumstances irrelevant and therefore prohibited.

Examination of the relevant caselaw involving classification based on race demonstrates an evolving jurisprudence with respect to the Court's view on reverse discrimination. In *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the Court considered an

equal protection challenge to a state-run medical school's reservation of spaces for minority students in its entering class. In his plurality decision, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color," and concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and would thus call for the most exacting judicial standard." *Id.* at 289, 98 S.Ct. at 2748.

In *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court again considered a Fourteenth Amendment challenge to remedial racial classification: whether a local school board may adopt race-based preferences in lay-off determinations. In Justice Powell's plurality opinion for the Court, he observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.* at 274, 106 S.Ct. at 1847.

In *City of Richmond v. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), the Court reviewed a municipality's determination to allot a percentage of its contracting work to minority-owned businesses. In its decision to strike down this program, the Court ultimately agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. *Id.* at 493-494, 109 S.Ct. at 722.

In the Court's most recent decision on this subject matter, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 221, 115 S.Ct. 2097, 2110 (1995), the Court made the following insightful comment,

> Despite lingering uncertainty in the details, . . . the Court's cases through *Croson* . . . established three general propositions with respect to governmental racial classifications. First, skepticism: '[a]ny preference based

> on race or ethnic criteria must necessarily receive a most searching examination;' . . . Second, consistency: 'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification' . . . And third, congruence: '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' . . .

(Citations omitted.)

The Court in *Adarand, supra* at 226, 115 S.Ct. at 2112, concluded that,

> 'A free people whose institutions are founded upon the doctrine of equality,' [*Hirabayashi, supra* at 2113, 63 S.Ct. at 1385] should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

However, despite the progression of Supreme Court decisions in the reverse discrimination arena, no decision of this Court resolves the issue of what constitutes an appropriate non-race based remedy in a disparate impact case or, if, or in what narrow circumstance, reverse discrimination may be permitted as the effect of a disparate impact remediation plan. The Township of North Bergen respectfully requests that this Court grant certiorari to analyze and determine this significant question of public importance.

## CONCLUSION

For the reasons set forth herein, petitioner Township of North Bergen respectfully requests that this Court reverse the decisions of the District Court and Court of Appeals, denying North Bergen's Motion to implead surrounding municipalities with residency requirements as parties to this action and remand this matter to the District Court for implementation of a remediation plan which does not impermissibly harm the rights of innocent third-party residents of North Bergen as applicants for municipal employment.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 96-5826, 96-5840 and 96-5847

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE NEW JERSEY STATE CONFERENCE, NAACP

—vs.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY; STATE OF NEW JERSEY

JAMES MCLARNON; DANIEL PESCHETTI; TONI ANNE RODRIGUEZ; PEDRO LUIS RODRIGUEZ; EDDIE SOMICK; WALTER SOMICK; PETE RUTS; JIM COWAN; CHRISTOPHER SELIGA; ROBERT FARLEY; JOHN SHEARSTONE; PETE GIUNCHINI; LOU ROMANO; THOMAS FERRARI; TUSHAR PATEL; GREGORY DEACUTIS; RICHARD CASTELLITO,

*Intervenor-defendants in D.C.*

TOWNSHIP OF NORTH BERGEN,

*Appellant.*

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE NEW JERSEY STATE CONFERENCE, NAACP

—VS.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY; STATE OF NEW JERSEY

JAMES MCLARNON; DANIEL PESCHETTI; TONI ANNE RODRIGUEZ; PEDRO LUIS RODRIGUEZ; EDDIE SOMICK; WALTER SOMICK; PETE RUTS; JIM COWAN; CHRISTOPHER SELIGA; ROBERT FARLEY; JOHN SHEARSTONE; PETE GIUNCHINI; LOU ROMANO; THOMAS FERRARI; TUSHAR PATEL; GREGORY DEACUTIS; RICHARD CASTELLITO,

*Intervenor-defendants in D C., Appellants*

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE NEW JERSEY STATE CONFERENCE, NAACP

*Appellants*

—VS.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY; STATE OF NEW JERSEY;

JAMES MCLARNON; DANIEL PESCHETTI; TONI ANNE RODRIGUEZ; PEDRO LUIS RODRIGUEZ; EDDIE SOMICK; WALTER SOMICK; PETE RUTS; JIM COWAN; CHRISTOPHER SELIGA; ROBERT FARLEY; JOHN SHEARSTONE; PETE GIUNCHINI; LOU ROMANO; THOMAS FERRARI; TUSHAR PATEL; GREGORY DEACUTIS; RICHARD CASTELLITO,

*Intervenor-defendants in D.C.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 95-00248)
District Judge: Honorable Maryanne Trump Barry

---

ARGUED September 26, 1997

BEFORE:

SLOVITER, *Chief Judge*,
COWEN and LEWIS, *Circuit Judges*.

---

*JUDGMENT ORDER*

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on November 22, 1996, be and is hereby AFFIRMED.

Each party shall bear its own costs.

BY THE COURT:

/s/ TIMOTHY K. LEWIS
Circuit Judge

Attest:

/s/ P. DOUGLAS SISK
Clerk
Date: October 15, 1997

Certified as a true copy and issued in lieu of a formal mandate on November 7, 1997.

Teste: /s/ [ILLEGIBLE]

Chief Deputy Clerk, U.S. Court of Appeals
For the Third Circuit.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Civil Action No. 95-248(MTB)

Filed November 20, 1996

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and THE NEW JERSEY STATE CONFERENCE, NAACP,

*Plaintiffs*,

—v.—

THE TOWNSHIP OF NORTH BERGEN NEW JERSEY, et al.,

*Defendants*.

---

*DECREE*

By opinion and order filed March 19, 1996, this court, consistent with *NAACP v. Harrison*, 940 F.2d 792 (3d Cir. 1991), the law of this circuit by which this court is bound, determined solely on the basis of statistical evidence that the residency requirements and preferences in municipal hiring imposed by the Township of North Bergen upon applicants for municipal employment had a disparate impact on the area's African American population in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and 2000e-2(k)(1)(A)(i), the only issue the court was then called upon to reach. *See NAACP v. North Bergen*, No. 95cv248 (D.N.J. March 19, 1996). It was, of course, apparent then and is apparent now that the Township of North Bergen's resi-

dency requirements and preferences had an adverse impact on *all* non-residents of all racial and ethnic groups. Those requirements and preferences were struck down.

Importantly, and statistical disparity aside, plaintiffs have not alleged even the specter of racism on the part of the Township of North Bergen in promulgating and enforcing its residency requirements and preferences and, presumably for that reason, counsel for plaintiffs stated at the final oral argument in this matter that plaintiffs' objective is to ensure that North Bergen's employment opportunities are available to all. Indeed, in plaintiffs' brief in support of their motion to enjoin the residency requirements and preferences, they argued that "the public interest as expressed in Title VII's prohibition on [sic] discrimination in employment can be served only by relief opening competition for jobs with North Bergen to members of all ethnic groups." Br. at 26.

There being no allegation and, certainly, no evidence that the statistical disparity seen here is the result of any prior discrimination against African Americans or that race was a factor in who could or could not apply for municipal positions, there is no discrimination based on race to remedy and a race-based remedy would, therefore, be not only unnecessary but wholly inappropriate. *See generally Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).[1] But even if the court were to assume, as a matter of law if not as a matter of fact, that a statistical showing of disparate impact of the residency requirements on African Americans is the functional equivalent of intentional discrimination for purpose of Title VII which could be remedied under this court's broad equitable

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[1] *And see* 42 U.S.C. § 2000e-(j) entitled "Preferential treatment not to be granted on account of existing number or percentage imbalance" states, in pertinent part, that an employer shall not be required "to grant preferential treatment to any individual or to any group because of . . . race, color, religion, sex, or national origin . . . on account of an imbalance which may exist with respect to the total number or percentage of [such] persons . . . employed by any employer . . . in comparison with the total number or percentage of [such] persons . . . in the available workforce in any community."

powers, see *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988), according what amounts to a preference to African Americans by ordering North Bergen to "take such measures as are necessary" to recruit African American applicants "in numbers reflecting their availability in the relevant labor market," including radio and cable television advertising aimed at an African American audience, Pls.' Proposed Order ¶¶ 5, 9, would, under the circumstances of this case, simply be wrong. This court cannot ignore the fact—and fact it be—that what this case is all about is the impact *not* of discrimination against one group of non-residents but the impact of residency requirements applied equally against all non-residents. To order that discrete relief be specifically targeted only at African Americans will result in fewer job opportunities for other racial and ethnic groups, most particularly Hispanics.[2] This court will not give with one hand only to take with the other, particularly given its obligation to consider, among other factors, the impact of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1986).

Accordingly, the parties having been unable to agree on the terms of a final decree and the court having reviewed the parties' extensive submissions, the injunctive relief set forth herein is, in the court's view, both equitable and appropriate.[3]

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[2] 41-42% of North Bergen residents are Hispanic, 20.5% of the township's municipal workforce is Hispanic, and the towns and cities in the area surrounding North Bergen are heavily Hispanic. (Exhibits and Deposition Excerpts in Support of Plaintiffs' Motion for Summary Judgment, 10, 11).

[3] Except for finding it unnecessary and inappropriate to "obligat[e] the [Township of North Bergen] to recruit and employ qualified black applicants in numbers reflecting their availability in the relevant labor market," *Harrison*, 940 F.2d at 797, this court has largely tracked the decree entered in *Harrison*. Parenthetically, the Third Circuit, in affirmating that decree, stated that the district court did not err in imposing affirmative recruitment and hiring obligations but did not state that such relief is required.

IT IS on this 20th day of November, 1996, therefore, ordered that

1. The Township of North Bergen, it officers, trustees, employees, agents and all other persons acting in concert with them (collectively "North Bergen") are permanently enjoined from enforcing or following Ordinance 1825-76, Ordinance 544-94 and any other written or unwritten policy, ordinance or state law imposing any requirement or granting any preference in recruiting, testing, selecting, or hiring of municipal employees based on past or present residence in North Bergen, provided that nothing in this decree shall be interpreted to prevent North Bergen from requiring personnel whose job functions may require rapid response to reside in or move to an area consistent with the job-related need for rapid response within a reasonable period after appointment. A requirement that emergency response personnel (including but not limited to police officers, firefighters, and snow removal personnel) move to within ten miles of their duty station within six months of appointment shall be presumptively valid.

2. North Bergen shall refrain from hiring any candidates from existing certified and eligible lists compiled on the basis or in consideration of North Bergen's residency requirements and preference ordinances and shall refrain from conducting any examination that was announced or otherwise advertised as subject to North Bergen's residency requirements and preferences. North Bergen shall, as soon as possible, coordinate with plaintiffs and with the New Jersey Department of Personnel to offer new examinations, and/or compile new lists from existing examination results, not subject to requirements or preferences based on residence within North Bergen. Until such time as the new lists are in place, North Bergen may hire for municipal positions only according to the following procedures: (a) North Bergen shall inform all parties to this action of its hiring needs at least sixty days before hiring is required; (b) the parties shall analyze available eligible lists, including but not limited to those currently in existence for North

Bergen residents, in an effort to identify a group of qualified individuals that all parties agree should be hired to fill emergency needs; and (c) if the parties are not able to agree on the individuals to be hired, the parties may petition this court to intervene in the matter. Persons currently on existing lists of eligibles shall be notified that they will have the opportunity to compete when new examinations are given but shall not be given any preference in rank on the new lists to be created.[4]

3. Hiring for all non-classified, non-competitive, and non-uniformed positions shall also be subject to subparts (a), (b) and (c) of Paragraph 2 above for one year from the date of this decree or until such time as new eligible lists are established for competitive positions, whichever is sooner.

4. Prior to administering any examination for municipal hiring, North Bergen shall coordinate with plaintiffs and the Department of Personnel to advertise the administration of the examinations, as well as the fact that the examinations will be open to non-North Bergen residents, in the classified advertisement section of newspapers which are sold outside the boundaries of North Bergen, on radio, and on cable television. Such advertisements shall be run prior to any examination offered while the decree is in effect. In the same manner, North Bergen shall, before any competitive examination is administered, advertise that non-North Bergen residents may submit applications and resumes for non-classified, non-competitive, and non-uniformed positions to be filled from North Bergen's standing resume bank. These advertisements shall be run at least once annually and any time applications are sought by North Bergen for a particular position while this

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[4] It is clear that the intervenors who are currently ranked on North Bergen's police officer and firefighter lists do not possess a constitutionally protected property interest in maintaining their current ranks. *See Harrison*, 940 F.2d at 809-12. Neither the Township nor the intervenors has offered a lawful and workable means of allowing those currently on the lists to retain their ranks and be integrated into new lists compiled from examinations not subject to North Bergen's residency requirements and preferences.

decree is in effect. In addition, any posting announcing municipal hiring or the administering of examinations for hiring by North Bergen shall indicate that the positions and examinations, if given, are open to non-North Bergen residents. North Bergen shall not be required to expend more than $3000 on advertising pursuant to this paragraph in any one year.

5. On February 1 and August 1 of each year in which this decree is in effect, North Bergen shall provide to plaintiffs a report, for the preceding six month reporting period ending December 31 and June 30, detailing the following:

a. a summary, indicating for North Bergen as a whole and for each job category by department, the number of persons by township of residence employed at the end of the reporting period and whether the job category is full-time, part-time, temporary, salaried, or hourly;

b. the number of persons by township of residence applying for employment in each job category within each department during the reporting period, the number of persons by township of residence taking each examination administered during the reporting period, and the number of persons by township of residence who pass each examination;

c. a list of all persons hired during the reporting period, showing each applicant's name, residence, job category and department, date of hire, whether, the position is full or part-time, and whether the person is a permanent, temporary, or seasonal employee;

d. a list of all persons terminated during the reporting period, showing for each his or her name, residence, job category and department, status as permanent, temporary, seasonal, or probationary, and the basis for appeal if any was taken;[5]

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[5] While, for the reasons discussed earlier, a reporting requirement based on race would be inappropriate, a reporting requirement will, nonetheless, be ordered by the court. Such a requirement will enable

6. North Bergen shall maintain all records necessary to prepare the reports described in Paragraph 5 above. To the extent that employee selection devices, such as examinations, are adminstered by the Department of Personnel, North Bergen shall request that information concerning the residence of applicants and eligibles be maintained and provided to North Bergen for inclusion in the periodic reports detailed in Paragraph 5. For positions filled by North Bergen directly, North Bergen shall create and utilize a form which allows it to identify and maintain data on the residence of applicants and to identify how each applicant became aware of the employment opportunity. Any records maintained pursuant to this decree shall be available to plaintiffs, by copy, upon written request and reasonable notice.

7. All elected offices and political appointments in North Bergen are exempt from the terms and requirements of this decree and nothing herein shall be interpreted to apply to or affect the means by which elected offices or political appointments are filled.

8. The provisions of this decree are not intended to lower the qualifications standards for employment with North Bergen. Nothing in this decree shall obligate North Bergen to create new positions, hire unnecessary personnel, contract or refrain from contracting out work, or hire, transfer or promote any person who is not qualified as measured by valid qualification standards or who is less qualified than another in the applicant pool.

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North Bergen to demonstrate that its history of enforcing residency requirements and preferences—the only cause of a disparate impact alleged in this case—is no longer deterring non-residents from applying for employment with the township, and that any unlawful effects caused by that history will have been remedied.

Nothing in this order, of course, will prevent plaintiffs from alerting the African American community—or any other group—to the fact that North Bergen's residency requirements and preferences have been lifted.

9. Within thirty days of the entry of this decree, plaintiffs may apply to this court for costs, attorneys' fees, and expert witness fees pursuant to 42 U.S.C. § 2000e-5(k) if the parties are not able to reach an agreement on the issue of costs and fees.

10. If any party to this decree believes that the decree has been or is about to be violated or that it is being or is about to be improperly applied, that party shall give reasonable written notice to opposing counsel and shall make good faith efforts to resolve the dispute. If such efforts prove unsuccessful, the parties may bring the matter to the attention of this court by appropriate motion.

11. This decree may be terminated five years after its entry upon motion made by North Bergen and upon a showing of substantial compliance with the terms hereof. Upon such motion, this decree shall remain in effect until such time as the court disposes of the motion. The court shall retain jurisdiction over this action for the purposes of enforcement, interpretation or modification of this decree until such time as this decree shall have been terminated by motion.

/s/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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Civil Action No. 95-248(MTB)

Filed November 5, 1996

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and THE NEW JERSEY STATE CONFERENCE, NAACP,

*Plaintiffs*,

—v.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,

*Defendant*.

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*ORDER*

This case having come before the court on defendant's motion to join the municipalities of Newark, Orange, East Orange, Bloomfield and Irvington as necessary parties pursuant to Rule 19(a)(1) of the Federal Rules of Civil Procedure; and this court having reviewed the submissions of the parties without oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure; and

it appearing that the only issue litigated in the liability phase of this case was whether the Township of North Bergen's residence requirement for municipal employment

had a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and 2000e-2(k)(1)(A)(i); and

it appearing that, consistent with the law of this circuit, that question was answered in the affirmative; and

it being the opinion of the court that "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties," Fed. R. Civ. P. 19 (a)(1); and

it being the opinion of the court that joinder of the proposed necessary parties is entirely unnecessary for according complete and just relief in this matter as those parties had nothing whatsoever to do with the merits of this case and need not play a role in fashioning an appropriate final decree;

IT IS on this 4th day of November, 1996

ORDERED that defendant's motion to join the municipalities of Newark, Orange, East Orange, Bloomfield and Irvington as necessary parties be and hereby is denied.

/s/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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Civil Action No. 95-248(MTB)

Filed March 19, 1996

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and THE NEW JERSEY STATE CONFERENCE, NAACP,

*Plaintiffs*,

—v.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,

*Defendant*.

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*ORDER*

This matter having come before the court on a motion for summary judgment filed by plaintiffs, the National Association for the Advancement of Colored People and the New Jersey State Conference, NAACP (jointly "NAACP") against defendant, the Township of North Bergen, New Jersey for injunctive relief preliminarily and permanently enjoining defendant's use of residency requirements and preferences in municipal hiring; and oral argument having been heard on March 15, 1996; and consistent with this court's opinion of even date,

IT IS this 18th day of March, 1996,

ORDERED that plaintiffs' motion for summary judgment with respect to liability be and hereby is granted; and it is further

ORDERED that defendant be and hereby is permanently enjoined from enforcing any residency requirement or preference, written or unwritten, for the purpose of municipal employment and hiring; and it is further

ORDERED that defendant be and hereby is preliminarily enjoined from causing testing to be done and from hiring any municipal employees, absent a showing that a public safety emergency requires interim hiring, pending further order of this court; and it is further

ORDERED that the parties will draft a mutually acceptable consent decree, fashioning appropriate relief not inconsistent with this order, and submit such consent decree to this court on or before April 9, 1996; and it is further

ORDERED that should the parties fail to reach an agreement, each party shall submit a proposed Decree, by April 16, 1996, with a memorandum not to exceed ten (10) pages in length explaining the elements the parties are unable to agree upon, and any matter in support of the party's proposal.

/s/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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Civil Action No. 95-248 (MTB)

Filed March 26, 1996

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and THE NEW JERSEY STATE CONFERENCE, NAACP,

*Plaintiffs,*

—v.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,

*Defendant.*

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*ORDER*

IT IS on this 26th day of March, 1996

ORDERED that this court's opinion dated March 18, 1996 be amended as follows:

that the last sentence of the carryover paragraph on page 9, which reads "The burden of persuasion, of course, remains firmly on the plaintiff throughout. *Harrison,* 940 F.2d at 798," shall be deleted.

/s/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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Civil Action No. 95-248(MTB)

Filed March 19, 1996

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and THE NEW JERSEY STATE CONFERENCE, NAACP,

*Plaintiffs*,

—v.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,

*Defendant*.

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## *OPINION*

*BARRY, District Judge*:

This case has come before the court on plaintiffs' motion for summary judgment seeking both preliminary and permanent injunctive relief to enjoin defendant's continued practice of effectively requiring all applicants for municipal employment with the Township of North Bergen, New Jersey to be township residents. According to plaintiffs, North Bergen's policy has a disparate impact on the area's African American population in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 (a) and 2000e-2(k)(1)(A)(i) (1991). For the reasons stated below, plaintiffs' motion for summary judgment will be granted with respect to liability,

and defendant's residency requirements, as currently in force, will be permanently enjoined.

## I. *Statement of the Case*

The material facts in this case are straight forward and undisputed. Defendant, the Township of North Bergen, is a municipality located in northern Hudson County, New Jersey. It covers an area of 5.5 square miles, is 7.5 miles long, and is less than a mile wide in most places. (DiPaolo Dep. at 175.) North Bergen has a population of 48,414.[1] Of that figure, approximately 50-51% are caucasian, 42% are Hispanic, 2-4% are Asian, and 1-2.09% are African American. (Auriemma Dep. at 42.) Hudson County, of which North Bergen is a part, has an African American population of 12-14% and Jersey City, with which North Bergen shares its southern border, is 28-30% African American.

North Bergen employs approximately 410 full time employees, 56 school crossing guards and 89 part time or seasonal employees. (Auriemma Dep. at 15-16.) Of the 365 full time municipal employees reported in North Bergen's 1995 EEO-4 forms, only 2 (0.55%) were African Americans (Pl.'s Exh. 1), and the township apparently does not dispute that less than 1% of its municipal work force is African American (Auriemma Dep. at 16-17). In Hudson County, the total full-time municipal work force is approximately 19.4% African American. (Hammerman Report, Pl.'s Exh. 2.) North Bergen's private work force consists of 14,693 employees, 8.4% of whom are African American.[2] (Hammerman Report, Pl.'s Exh 2.)

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[1] This figure; as well as the figures relating to the township's demographic distribution, represents the results of the 1990 census, submitted as plaintiffs' exhibit 11. All parties appear to accept the 1990 figures as current for the purposes of this motion.

[2] The demographic data for North Bergen's private work force was obtained from EEO-1 forms submitted by the township's private employers. Such forms, however, must be filed only by establishments

On June 3, 1976, North Bergen adopted Ordinance No. 1825-76, which requires all township employees to be "bona fide residents" of North Bergen.[3] (Pl.'s Exh. 12.) The stated purpose of the ordinance was

> to enhance the quality of its employees through greater personal knowledge of the municipality's conditions and by a feeling of greater stake in the municipality's progress, the diminution of absenteeism and tardiness of personnel, the ready availability of trained manpower in emergency situations and the economic benefits flowing from local expenditures of employees' salaries. . . .

*Id.* In addition, the ordinance provides that a department head may, in his or her discretion, waive the residence requirement if the department's hiring needs so require. This waiver has been invoked for approximately 15-20 employees, most of whom hold special licenses or qualifications not present in the available local resident labor pool. (Auriemma Dep. at 26-28.)

North Bergen maintains a central resume bank for non-competitive, non-uniformed jobs, classified primarily as laborer or clerk-typist positions. For these positions, North Bergen recruits via cable television that reaches northern Hudson County, but not Jersey City. In addition, it advertises in both English and Spanish newspapers. When a department

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with 100 employees or more. Thus, defendant claims that there are an additional 3,000-4,000 private employees in North Bergen that work for small, non-reporting establishments, who, therefore, have not been properly accounted for in plaintiffs' analysis. (Def.'s Br. in Opp. at 20.) According to defendant then, plaintiffs' data, compiled solely from the EEO-1 forms, is unreliable. As will be discussed in greater detail below, this court finds plaintiffs' evidence to be sufficient and defendant's challenge to it to be meritless.

[3] New Jersey law expressly permits a township to adopt a residence requirement for municipal hiring. *See* N.J.S.A. 40A:9-1.3 ("Unless otherwise provided by law, the governing body of any local unit may, by resolution or ordinance, as appropriate, require. . . all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein. . . .").

seeks to hire for such a position, the central bank screens the resumes on file for entry level qualifications and residency within the township. Pursuant to Ordinance No. 1825-76, township residents are given first priority, and according to Joseph Auriemma, the Township Administrator, there is no shortage of resident applicants for entry level positions. (Auriemma Dep. at 34.)

The hiring process for competitive jobs, mainly police and fire department positions, is somewhat more involved. Police officer and firefighter candidates register for and take an examination administered by the New Jersey Department of Personnel. Notices of upcoming examinations are posted throughout the township, published in a bulletin issued by the Department of Personnel, and advertised on local cable television. (Busacco Dep. at 89; Auriemma Dep. at 29-30.) Based upon the candidates' scores, the Department of Personnel compiles a list of eligibles. According to defendant, such lists may remain in effect for up to four years. N.J.S.A. 11A:4-6. That is, for up to four years after an examination is given and a list of eligibles is compiled, the township may draw on names from that list as vacancies arise.

New Jersey law prohibits the imposition of a residency requirement as a condition of continued employment for municipal police officers and firefighters. N.J.S.A. 40A:14-9.1; N.J.S.A. 40A:14-122.1. Thus, Ordinance No. 1825-76 does not apply to these departments. Rather, the residency requirements for North Bergen's police and fire departments are contained in Ordinance No. 544-94. (Pl.'s Exh. 13.) That ordinance "requires residency as of the date of appointment with respect to police and fire fighter candidates. The residency must continuously be maintained from the closing date up to and including the date of appointment." *Id.* The "closing date" is the last date on which a candidate may file an application to take the examination. The "date of appointment" occurs after a candidate has been accepted from the list of eligibles and has completed one year of probationary employment with the department. (Busacco Dep. at 85-86.)

The list of police eligibles in effect as of June 1995 had a closing date of August 13, 1990. (Pl.'s Exh 3.) A new list of eligibles was promulgated effective from August 3, 1995 through August 2, 1999. The current list of firefighter eligibles will not expire until August 1996, and, according to plaintiffs, had a closing date not after May 1992. Thus, in order to qualify as bona fide residents, candidates for police officer positions were required to maintain a residence in the township for up to six years, while firefighter candidates currently are required to maintain a North Bergen residence for up to five years.

Technically, Ordinance No. 544-94 operates more as a residency preference than a requirement. North Bergen classifies its applicants for police officer and firefighter positions into four categories. They are i) residents of the township; ii) other residents of the county; iii) other residents of the state; and iv) all other qualified applicants. Only after exhausting the list of eligibles from class (i) may the township draw on eligibles from the remaining classes.[4] In its effect, however, Ordinance No. 544-94 is a residency requirement. North Bergen has never experienced a shortage of qualified township residents for police officer or firefighter positions. (Auriemma Dep. at 64; Busacco Dep. at 91; DiPaolo Dep. at 172.) Defendant has, in fact, conceded as much by arguing that New Jersey law allows a municipality to "effectively limit applicants for police and fire positions to its residents." (Def.'s Br. in Opp. at 14.) Indeed, the announcement for the police officer examination issued July 1, 1990 specified that the examination for North Bergen was "open to residents" of the township. (Pl.'s Exh. 3.)

On May 20, 1993, the National Association for the Advancement of Colored People and the New Jersey State Conference, NAACP, (jointly "NAACP") filed a charge of discrimination against North Bergen Township with the Equal

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[4] This scheme is expressly authorized by New Jersey statutes. *See* N.J.S.A. 40A:14-10.1a; N.J.S.A. 40A:14-123.1a.

Employment Opportunity Commission ("EEOC"). On October 21, 1994, the EEOC issued a right to sue letter. (Pl.'s Exh. 9.) On January 20, 1995, the NAACP filed its complaint with this court. The complaint alleges that the township's residency requirement for municipal employment disparately impacts African Americans in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 (a) and 2000e-2(k)(1)(A)(i).

## II. *Discussion*

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, a court may grant a properly supported motion for summary judgment where the non-moving party's evidence is "merely colorable" and "not sufficiently probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

These standards, of course, can only be understood in the context of the applicable substantive law. Accordingly, it is there that this court now turns. Title VII provides that

> [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire. . . any individual. . . because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities. . . because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (a). These proscriptions apply " 'not only to overt discrimination but also practices that are fair in form but discriminatory in operation.' " *Newark Branch, NAACP v.*

*Township of Harrison, New Jersey*, 940 F.2d 792, 798 (3d Cir. 1991) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). Thus, the "disparate impact" theory of liability was developed to address employment practices that, absent a discriminatory motive, "'may in operation be functionally equivalent to intentional discrimination.'" *Id.* (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988))

In 1991, Congress codified the burdens of proof that both plaintiffs and defendants must satisfy in a disparate impact case:

> [a]n unlawful employment practice based on disparate impact is established under this subchapter only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(a)(i) (1991). After a plaintiff has identified the specific employment practice at issue, plaintiff then must prove causation typically through "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994. To do so, a plaintiff must compare the racial composition of employees in the position in question with the composition of those in the "relevant labor market." *Harrison*, 940 F.2d at 798. If this comparison reveals statistics which adequately prove that the practice in question has caused the exclusion of a racial, or otherwise protected, class, the defendant employer then must come forward with evidence demonstrating that "the challenged practice is job related for the position in question and consistent with business necessity," 42 U.S.C. § 2000e-2(k)(l)(a)(i). The burden of persuasion, of course, remains firmly on the plaintiff throughout. *Harrison*, 940 F.2d at 798.

### A. *Plaintiffs' Prima Facie Case*

Having identified North Bergen's residency requirements as the employment practices at issue, plaintiffs have garnered a wealth of statistical evidence that, under the standards set forth in the relevant case law, clearly satisfies their burden under Title VII. Plaintiffs assert, and the township apparently does not contest, that North Bergen's municipal work force is 0.55% African American. This figure then must be compared to the percentage of African Americans in the relevant labor market. Plaintiffs have identified two relevant labor markets with which to compare the 0.55% figure. First, plaintiffs have pointed to the full-time municipal work force in Hudson County. That market is approximately 19.4% African American. (Hammerman Rep. Attachment 11, Pl.'s Exh 2.) Second, plaintiffs identify the private, non-municipal work force in North Bergen. African Americans comprise approximately 8.4% of that labor market. (Hammerman Rep. Attachment 7, Pl.'s Exh. 2.) Both of these labor markets provide permissible comparisons for the necessary statistical analyses.[5] Using, for comparison purposes, the labor market least favorable to

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[5] In *Harrison*, on facts nearly identical to the case at bar, the district court compared the percentage of African Americans in the township's municipal work force with the percentage of African Americans in both the township's private labor market and the civilian work force of the four counties nearest to Harrison Township. *Harrison*, 940 F.2d at 799-800, *aff'g*, 749 F. Supp. 1327, 1338-40 (D.N.J. 1990). Thus, plaintiffs' identification of North Bergen' [sic] private work force as a relevant labor market provides precisely the comparison that was sanctioned by the United States Court of Appeals for the Third Circuit in *Harrison*. Unlike plaintiffs in the case at bar, however, the district court in *Harrison* did not identify the county's municipal work force as a relevant labor market. Rather, it identified a broader geographic area (four counties instead of one) and considered the area's private labor market rather than its municipal work force. Thus, the market identified by plaintiffs in this case is more closely related to the subject sample (North Bergen's municipal work force) than was the market relied upon in *Harrison*. In addition, it is more closely related, substantively, as it provides a more accurate measure of the number of African Americans qualified for and willing to accept municipal employment.

plaintiffs' position, the disparity between the approximately 0.55% African American population of North Bergen's municipal work force and the 8.4% population of its private work force, represents, according to plaintiffs, approximately 5.4 standard deviations.[6] That is, the possibility that the disparity in North Bergen's municipal work force is due simply to chance is remote to say the least. The Supreme Court has cautioned that no specific number of standard deviations alone can suffice to establish a plaintiff's prima facie case in the area of employment discrimination. *Watson*, 487 U.S. at 996 n.3. However, the Court has also noted that, as a general rule, a deviation of more than two to three standard deviations renders a given distribution particularly suspect. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977) (citing *Castaneda v. Partida*, 430 U.S. 482, 497 n.17).

Standard deviation analysis aside, the fact remains that while the available labor market is between approximately 8.4% and 19.4% African American, the African American representation in North Bergen's municipal work force is only

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[6] A standard deviation "is a unit of measure that allows statisticians to measure all types of disparities in common terms." *Palmer v Shultz*, 815 F.2d 84, 92 n.7 (D.C. Cir. 1987). One standard deviation represents the typical or expected variance from the mean in a random sample. Thus, without doing justice to statistical dogma, standard deviations can be seen to reflect, albeit indirectly, the likelihood that a particular disparity, is due to chance. The greater the number of standard deviations, the more likely it is that some force other than pure chance is driving the outcome.

Plaintiffs calculated the standard deviations in the case at bar as follows: n(number of municipal employees reported on North Bergen's EEO-4 form) =365; b(number of African Americans) =2; p(percentage of African Americans in the relevant labor market according to North Bergen's EEO-1 forms) =.084; np(expected number of African Americans) =30.66; np-b(expected less actual number of African Americans) =28.66; q(1 – p) =.916. Accordingly, one standard deviation from the expected number of African Americans is s(square root of npq) =5.3. In other words, it would be statistically expected that there should be roughly between 25 and 35 African Americans employed by the township. The shortfall of 28.66 African Americans off the mean thus represents 5.4 standard deviations.

approximately 0.55%. Of course, these statistical analyses suggest only that the disparity is most likely caused by a force other than pure chance. And while this court possess [sic] no statistical expertise by any means, the statistical evidence presented by plaintiffs' expert, which is largely unchallenged by defendant, convinces this court that something other than chance is at play.[7]

Defendant's only challenge to plaintiffs' statistical evidence is that, because only employers with 100 employees or more must file an EEO-1 form, plaintiffs' reliance on the forms under-counts North Bergen's civilian work force by approximately 3,000-4,000 employees. If this were true, plaintiffs' calculation that the township's private work force is 8.4% African American would be unreliable. Defendant's challenge is unavailing for two reasons. First, in *Harrison*, the court found that statistics gathered solely from the township's EEO-1 forms "conclusively" established the percentage of African Americans in the township's private labor pool. *Harrison*, 749 F. Supp. at 1338, *aff'd*, 940 F.2d 792. Secondly, even if there were an additional 4,000 private employees in North Bergen, and all 4,000 were caucasian, the disparity would still reflect approximately 4.7 standard deviations from the mean.[8] Significantly, defendant does not argue that the

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[7] The statistical disparity in *Harrison* was much more pronounced than that present in the case at bar. There, the court identified the relevant labor market as being approximately 22% African American, while there were no African Americans on Harrison's municipal labor force. *Harrison*, 749 F. Supp. at 1338-40. Here, of course, the disparity is not quite as marked. Plaintiffs' unchallenged statistical evidence is enough to convince this court, however, that the township's residency requirements are primarily, if not exclusively, responsible for the dearth of African Americans on the township's municipal work force. That, alone, does not mean that the township has acted discriminatorily for Title VII purposes. Rather, because defendant has offered no competing explanation for the disparity, the statistical disparity means only that plaintiffs have made a sufficient showing to shift the burden of going forward to defendant.

[8] This calculation would be: n(number of municipal employees reported on North Bergen's EEO-4 form) =365; b(number of African

disparity is caused by anything other than its residency requirement. Accordingly, this court must conclude that plaintiffs have established their *prima facie* case of employment discrimination under the disparate impact theory of liability.

B. *Defendant's Business Justifications*

Title VII allows an employer to rebut a plaintiff's evidence of a disparate impact by demonstrating that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Defendant has offered an array of purported business justifications, all of which fail to meet Title VII's exacting standard. First, defendant argues that its residency requirements enhance the quality of its employees through a greater knowledge of and stake in the community, while decreasing employee absenteeism and tardiness. This identical argument was summarily rejected by the court in *Harrison*, as being "too nebulous and insubstantial" to be considered a business necessity. *Harrison*, 749 F. Supp. at 1342. *Accord, Newark Branch, NAACP v. Township of West Orange*, 786 F. Supp. 408, 433 (D.N.J. 1992). This court entirely agrees. Moreover, defendant has produced absolutely no meaningful evidence to suggest that its residency requirements actually do enhance the quality of its employees and decrease absenteeism or tardiness.

Defendant further argues that, with respect to police officers and firefighters, the residency requirement ensures readily available manpower and reduces response time when off-duty officers are called to emergency situations. This argument, too, was flatly rejected in both *Harrison*, *id.* at

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Americans) =2; p(percentage of African Americans in the relevant labor market according to North Bergen's EEO-1 forms) =.066; np(expected number of African Americans)=24.09; npb(expeeted less actual number of African Americans) =22.09; q(1 – p)=.934. Accordingly, one standard deviation from the expected number of African Americans is s(square root of npq) =4.7. The shortfall of 28.66 African Americans thus would be 4.7 standard deviations.

1342, and *West Orange*, 786 F. Supp. at 433-34. The *Harrison* court rejected the response time justification as being insufficiently connected to the residency requirement. As that court reasoned, a residency requirement is not the only means for the township to address its response time concerns. *Id.* at 1342. Rather, an adequate response time could be equally ensured by requiring residency within a certain radius from the township's borders, thus allowing the township to draw on African American applicants from neighboring towns. *Id. See also West Orange*, 815 F. Supp. at 433-34.

Standing alone, that rationale would give this court some pause. If ensuring a reasonable response time is a legitimate business necessity—which all courts have recognized it to be[9]—then the question of how best to pursue that interest should be reserved for the municipal government as opposed to the federal courts. As the *Harrison* court also recognized, however, any response time argument is severely undercut by the fact that New Jersey law prohibits a township from conditioning a police officer or firefighter's continued employment on his or her residency within the town. N.J.S.A. 40A:14-9.1; N.J.S.A. 40A:14-122.1. Thus, as in *Harrison*, North Bergen's residency requirement is merely an obstacle to applying for a position, and does not in any way prevent a police officer or firefighter from moving outside the township once he or she has completed the requisite probationary period. While the goal of ensuring a reasonable response time appears to this court to be perfectly legitimate, and even necessary, defendant's residency requirements for police and fire department eligibles does not serve that end. *See Harrison*, 749 F. Supp. at 1342; *West Orange*, 786 F. Supp. at 433-34.

Moreover, Angelo Busacco, North Bergen's Chief of Police, testified that off-duty police officers are rarely, if ever, called for emergency service since, in a large-scale emergency, calling on-duty police officers from neighboring jurisdictions would result in a quicker response time than resorting

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[9] *See Harrison*, 940 F.2d at 804-05; *West Orange*, 786 F. Supp. 433-34.

to North Bergen's own off-duty force. (Busacco Dep. at 104-05.) In addition, Chief Busacco testified that he was aware of no empirical data linking residency within the township to better job performance.[10] (Busacco Dep. 82-83.) Thus, this court is convinced that defendant's response time justification fails to bring its residency restrictions for police and fire department eligibles within Title VII's requirement that the employment practice be "job related for the position in question and consistent with business necessity." *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Defendant's third proffered justification is novel, though equally unavailing. According to defendant, its residency requirements inure to the benefit of the township's growing Hispanic population and serve to ensure that the township's municipal work force will mirror North Bergen's demographic composition. This court is hard-pressed to see how such a justification could be "job related *for the position in question* and consistent with business *necessity*." Clearly, it is not.

Rather, what defendant has articulated is an affirmative action policy. According to defendant, such a policy is warranted to remedy the inequities that Hispanics throughout Hudson County and New Jersey traditionally have experienced in the work force. To support this thesis, defendant has offered statistics evidencing the reality that Hispanics throughout Hudson County and New Jersey continue to experience a higher unemployment rate and receive lower wages, on average, than the caucasian community. (Def.'s Br. in Opp. at 21-22.) This court does not disagree with defendant's statistical evidence. Such evidence, however, is clearly insufficient to justify an affirmative action policy. As the Supreme Court stated in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986),

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[10] Likewise, John DiPaolo, North Bergen's Fire Chief, testified that although response time is a "most critical factor" (DiPaolo Dep. at 159), he noted that one fire captain lived technically out of town, but only two blocks from the station. (DiPaolo Dep. at 156-57.)

> [t]his Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

*Id.* at 274.

Thus, defendant's evidence offered to support its affirmative action policy fails for three obvious reasons. First, defendant's figures do not even suggest, let alone prove, that the economic disparities are the product of discrimination. Indeed, it is far more likely that the greater portion of the disparity is due not to a history of discrimination but to realities such as language barriers and lower average levels of skills and education. Absent a history of discrimination, an affirmative action policy is impermissible. *Id.*

Second, even if defendant's statistics did reflect a history of discrimination, the Supreme Court has made clear that such a history must be identified within the "governmental unit involved." *Id.* at 276 ("[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"). Here, defendant's analysis addresses only county and state figures without focusing on a history of discrimination against Hispanics *in the township*. Without a showing of a pattern of discrimination within North Bergen, itself, the township cannot be permitted to effectively penalize the non-Hispanic population through an affirmative action policy intended to remedy the alleged discrimination practiced elsewhere in the state.

Third, even if defendant had successfully proven a history of discrimination against Hispanics in North Bergen, it certainly has not chosen means "specifically and narrowly framed" to effect a remedy. *Id.* at 280 (recognizing that affirmative action policies, like all racial classifications, must be narrowly tailored and are subject to the strictest judicial scrutiny). Indeed, while allegedly intended to assist the Hispanic community, the township's residency requirements have

effectively shut out African Americans, and possibly other protected groups. Clearly, if the township's genuine concern was to benefit its Hispanic residents (assuming a history of discrimination in the township had been proven) it could begin to remedy that discrimination without enforcing the blanket exclusion of African Americans that currently results from its residency requirements.

Finally, this court can summarily dispense with defendant's argument that its residency requirements are permitted by New Jersey law and, therefore, are permissible. As this court has discussed above, New Jersey law does permit townships to adopt residency requirements of the type at issue in this case. However, that does not mean that localities are free to implement and apply residency requirements in a discriminatory manner. All state and local laws are, of course, subject to the strictures of Title VII, and, in the case at bar, defendant's residency requirements must be enjoined for being violative of that statute. Thus, whether the residency requirements are consistent or inconsistent with New Jersey law is wholly irrelevant to this court's analysis.[11]

In sum, defendant has produced no objective evidence which even suggests that its proferred business justifications are served in any significant way by the residency requirement. *Harrison*, 940 F.2d at 804.

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[11] Of course, the question of the relevant New Jersey statutes' validity is not before this court. Presumably, however, a township with an integrated population could impose a residency requirement that would be perfectly consistent with the requirements of Title VII. In the case at bar, it is not the residency requirements, *per se*, that are violative of Title VII, but, rather, it is their specific application in North Bergen and the disparate impact resulting from the imposition of such residency requirements on a labor market with the unique demographic composition available in the township. Accordingly, today's decision in no way affects the validity of any New Jersey statute.

## III. *Conclusion*

For the reasons discussed above, this court concludes that defendant's residency requirements embodied in Ordinance No. 1825-76 and Ordinance No. 544-94 disparately impact the region's African American population in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and 2000e-2(k)(1)(A)(i). Accordingly, this court will grant plaintiffs' motion for summary judgment as to liability and will permanently enjoin defendant from enforcing Ordinance No. 1825-76, Ordinance No. 544-94, or any other similar residency requirement, written or unwritten, in the context of municipal employment and hiring. In addition, defendant will be preliminarily enjoined, as of the date of the accompanying order, from causing testing to be done and from hiring any new municipal employees, absent a showing that a public safety emergency requires interim hiring, pending further order of this court. Finally, the court will retain jurisdiction over the case, and will forego fashioning a final decree at this time in order to allow the parties an opportunity to reach an agreement, consistent with this opinion and *Harrison*, as to the appropriate remedy for the discriminatory effect of North Bergen's residency requirement.

/s/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
U.S.D.J.

Dated: March 18, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Civil Action No. 95-248 (MTB)

Filed January 20, 1995

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and THE NEW JERSEY STATE CONFERENCE, NAACP,

*Plaintiffs,*

—v.—

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,

*Defendant.*

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## COMPLAINT

1. This Court has jurisdiction of this action under 42 U.S.C. 2000e-5, 28 U.S.C. 1331 and 28 U.S.C. 1343.

2. Plaintiffs, the National Association for the Advancement of Colored People (hereinafter "NAACP") and the New Jersey State Conference of Branches of the NAACP, are voluntary associations committed to the improvement of the status of minority groups, the elimination of discriminatory practices and the achievement of civil rights. Membership in local branches of the NAACP includes membership in the national NAACP, and the local branches are part of the State Conference of Branches. The NAACP has local branches in Newark, Jersey City and elsewhere in northern New Jersey. While the NAACP and its constituent units are committed to the achievement of civil rights and equal opportunities for all minority groups, the majority of its members are African-American.

3. The defendant, Township of North Bergen, is established and incorporated under the laws of the State of New Jersey, and is a political subdivision of the State of New Jersey located in Hudson County.

4. The defendant is a person within the meaning of Title VII, 42 U.S.C. 2000e-(a) and an employer under the meaning of 42 U.S.C. 2000e-(b).

5. The Plaintiffs represent the interests of their members and other black persons in eliminating discriminatory employment practices and other barriers to equal employment opportunities, in remedying the effects of such discriminatory practices and in securing the rights conferred by Title VII.

6. Black members of the plaintiffs and other persons represented by plaintiffs who are qualified for positions with the defendant Township of North Bergen, have been injured by defendant's racially discriminatory employment practices, and are threatened with continued and future injury by defendant's

racially discriminatory recruitment and hiring practices. Such persons have been injured by defendant's racially discriminatory hiring preferences and by its denial of timely information about employment opportunities with defendant. They have been deterred from applying for positions with North Bergen because they reasonably believed that an application for employment with defendant would be futile due to the discriminatory practices of defendant.

7. Several black members of plaintiffs who are qualified for positions with North Bergen, who are interested in such positions, who live within the labor market from which North Bergen should hire, and who have written letters of application and/or otherwise sought positions with North Bergen have been injured by defendant's racially discriminatory practices of recruiting only residents and applying a hiring preference for residents. Not one of them has been hired or offered employment by the defendant or been permitted to compete for positions with North Bergen on a non-discriminatory basis.

8. The Township of North Bergen has approximately 48,414 residents. Of these, approximately 1.014 [sic] (2.1%) are black.

9. Private employers in the North Bergen zip code (07047) that file EEO-1 reports, employ approximately 14,693 persons of whom approximately 1,227 (8.4%) are black.

10. Upon information and belief, the defendant employs some 560 municipal employees, fewer than 1% of whom are black.

11. North Bergen is a "civil service" municipality under New Jersey law. Positions in the competitive classified service of North Bergen, such as entry level police officer and firefighter positions are filled through examinations announced and administered by the New Jersey Department of Personnel. On information and belief, entry level laborers and clerk typists are hired directly by North Bergen.

12. Defendant has a policy and practice of using municipal residence as a prerequisite for eligibility to compete for most municipal jobs unless no qualified resident is available to fill the job. Pursuant to the New Jersey Residence Act, N.J.S.A. 40A:9-1, *et. seq.*, North Bergen has directed the Department of Personnel to announce examinations for competitive classified positions with North Bergen as "open to residents of North Bergen," to compile "residents only" lists of eligibles for such positions and has directed that the Department of Personnel "shall not open [North Bergen's] eligibility lists to anyone who is not a bona fide resident of [North Bergen] . . . [unless] an insufficient number of qualified residents exist for available positions . . ." N.J.S.A. 40A:9-1.4.

13. On information and belief, defendant also classifies applicants for laborer, clerk typist and other positions for which it hires directly according to municipal residence, restricts recruiting to methods aimed at municipal residents, and hires only municipal residents for such jobs unless no qualified municipal resident is available for the job.

14. The defendant engages and has engaged in employment policies and practices which have discriminated and continue to discriminate against African Americans, including members of and other persons represented by the plaintiffs, because of their race. The defendant has implemented these policies, among other ways, by:

a. Refusing to recruit and hire blacks on the same basis as whites;

b. classifying candidates for employment in a discriminatory manner according to residence and recruiting and hiring only residents of North Bergen, fewer than 3% of whom are black;

c. failing or refusing to adopt objective, valid and nondiscriminatory hiring procedures; and

d. failing or refusing to take appropriate action to correct the effects of its past discriminatory policies and practices.

15. The defendant's acts and practices described in above constitute a pattern and practice of resistance to the full enjoyment of the rights of blacks (including the rights of members and other persons represented by plaintiffs) to equal employment opportunities with the Township of North Bergen without discrimination because of race. These acts and practices are of such a nature and are intended to deny the full exercise of rights secured by Title VII of the Civil Rights Act of 1964, as amended, to blacks, including blacks who are members of the plaintiffs or are otherwise represented by the plaintiffs.

16. The plaintiffs have conducted an investigation of the defendant's employment practices. The plaintiffs have notified the defendant of the results of the investigation and have attempted to eliminate discriminatory practices through negotiation and settlement, but were unsuccessful in these attempts.

17. The NAACP filed a charge of discriminatory employment practices against defendant with the United States Equal Employment Opportunity Commission (Charge No. 171930541, Filed June 11, 1993) and has obtained a right to sue letter dated October 21, 1994. The plaintiffs have performed all of the prerequisites necessary to filing suit under Title VII.

18. Unless restrained by order of this Court, the defendant will continue to pursue policies and practices that are the same as or similar to those alleged in this complaint, and will not take adequate steps to redress the discriminatory effects of those policies and practices. Such policies and practices cause irreparable injuries to those whom plaintiffs represent that cannot be remedied at law.

WHEREFORE, the plaintiffs pray for orders preliminarily and permanently enjoining the defendant, its officers, agents,

employees, successors and all persons in active concert or participation with them for engaging in employment practices which discriminate on the basis of race, and specifically from:

a. Discriminating against blacks on the basis of race in the recruitment, selection and hiring of employees;

b. classifying applicants for employment in a manner that tends to discriminate against African Americans;

c. failing to adopt fair and nondiscriminatory employment practices which are designed to assure that black applicants for employment and black employees are treated without discrimination and are treated as fairly and as well as white applicants for employment and employees who are equally qualified for the employment they seek;

d. failing to adopt and implement a vigorous recruitment program designed to attract qualified black applicants for employment by the Township of North Bergen in numbers which at least reflect the proportion of blacks within the relevant labor market; and to advise those blacks who live outside the Township of North Bergen but within the relevant labor market when employment applications are being accepted that defendant is an equal opportunity employer and seeks qualified black applicants for municipal employment, as well as other qualified applicants;

e. failing to adopt recruitment and hiring practices designed to achieve the objective of recruiting and hiring a work force which reflects the availability of qualified blacks in the labor force of the labor market which is relevant to the Township of North Bergen; and

f. failing to take such measures, except for the award of back pay, as may be appropriate to correct for the present effects of North Bergen's past discriminatory employment practices.

Plaintiffs pray in addition for the costs of litigation including reasonable attorneys' fees and expert fees, and for such additional relief as justice may require.

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January 18, 1995

[LETTERHEAD OF NEW JERSEY DEPARTMENT OF PERSONNEL]

Current and Anticipated

## LAW ENFORCEMENT VACANCIES

While this announcement applies to all of the titles and jurisdictions shown on the front cover, the titles, jurisdictions, residency priorities and salaries for those jurisdictions that have current or anticipated needs are listed as follows:

## POLICE TITLE AREA

POLICE OFFICER

| JURISDICTION | RESIDENCY PRIORITY | SALARY |
|---|---|---|
| Alpha Boro | None | $15,500-$34,742 |
| Bayonne | Bayonne | $27,447-$47,544 |
| Berkeley Twp | Berkeley Twp | $21,000-$51,778 |
| Buena Boro | Buena Boro | $20,637-$34,395 |
| Delanco Twp | Delanco Twp | $28,000-$37,599 |
| Dover | Dover | $27,000-$51,120 |
| Gloucester Twp | Gloucester Twp | $24,014/year |
| Hammonton | Hammonton | $26,000-$46,000 |
| Hazlet Twp | Hazlet Twp | $27,168-$46,894 |
| Lawnside Boro | None | $20,000-$26,755 |
| Margate City | Margate City | $25,500-$46,217 |
| Mt. Holly Twp | Mt. Holly Twp | $34,362-$43,855 |
| Newark | Newark | $31,300-$47,401 |
| Nutley | Essex County | $32,023-$48,646 |
| Ocean City | Ocean City | $27,086-$46,577 |
| Rahway | Rahway | $25,000/year |
| Salem City | Salem City | $28,179-$37,277 |
| Scotch Plains Twp | Scotch Plains Twp | $22,500-$50,000 |
| Seaside Heights Boro | Seaside Heights Boro | $26,321/year |
| Somerdale Boro | Somerdale Boro | $21,515-$35,825 |
| S. Toms River Boro | S. Toms River Boro | $15,000-$45,000 |
| Stanhope Boro | Stanhope Boro | $31,000-$42,000 |
| Vernon Twp | None | $31,374-$48,628 |
| Woodlynne Boro | Woodlynne Boro | $24,107-$38,142 |

POLICE OFFICER BILINGUAL IN SPANISH AND ENGLISH

Anticipated vacancies are expected for this title, however, specific jurisdictions have not yet been identified.

## SHERIFF TITLE AREA

SHERIFF'S OFFICER

| JURISDICTION | RESIDENCY PRIORITY | SALARY |
|---|---|---|
| Atlantic County | Atlantic County | $27,221-$38,001 |
| Camden County | Camden County | $28,061-$40,874 |
| Cape May County | Cape May County | $18,000-$32,708 |
| Cumberland County | Cumberland County | $19,500/year |
| Essex County | Essex County | $25,439-$42,929 |
| Gloucester County | Gloucester County | $22,939/year |

SHERIFF'S OFFICER, BILINGUAL IN SPANISH AND ENGLISH

Anticipated vacancies are expected for this title, however, specific jurisdictions have not yet been identified.

## CORRECTIONS TITLE AREA

CORRECTION OFFICER RECRUIT

| JURISDICTION | RESIDENCY PRIORITY | SALARY |
|---|---|---|
| State-all facilities except: | None | $31,805/year |
| Northern State Prison | Newark | $31,805/year |
| Riverfront State Prison | Camden City | $31,805/year |
| Leesburg/Bayside State Prison | Maurice River Twp<br>Cumberland and Cape May Counties<br>Salem County | $31,805/year |

CORRECTION OFFICER RECRUIT (cont'd)

| | | |
|---|---|---|
| Southern State Correctional Facility | Maurice River Twp<br>Cumberland and Cape May Counties<br>Salem County | $31,805/year |
| South Woods State Prison | Bridgeton<br>Cumberland and Salem Counties<br>Cape May County | $31,805/year |

COUNTY CORRECTION OFFICER

| JURISDICTION | RESIDENCY PRIORITY | SALARY |
|---|---|---|
| Camden County | Camden County | $23,176/year |
| Cape May County | Cape May County | $18,000-$32,708 |
| Cumberland County | Cumberland County | $19,000-$30,000 |
| Gloucester County | Gloucester County | $22,939-$34,408 |
| Morris County | Morris County | $21,000-$48,000 |
| Warren County | None | $21,875-$33,909 |

CORRECTION OFFICER RECRUIT, BILINGUAL IN SPANISH AND ENGLISH

COUNTY CORRECTION OFFICER BILINGUAL IN SPANISH AND ENGLISH

Anticipated vacancies are expected for both of these titles, however, specific jurisdictions have not yet been identified.

If your jurisdiction is not listed above but you are interested in law enforcement job opportunities, you should apply. The list also may be used for other jurisdictions and other law enforcement titles in response to hiring needs. For jurisdictions without specific residency ordinances, eligibility is open to all residents of New Jersey.

[LETTERHEAD OF RUTGERS UNIVERSITY]

October 17, 1996

Ms. Corinne Mullen
5 Marine View Plaza
Suite 320
Hoboken, NJ 07030

Dear Ms. Mullen:

In response to a request I received from you, I have conducted statistical analyses on employment data from three New Jersey cities, viz., Bloomfield, East Orange, and Newark, to determine whether staffing procedures used in those municipalities have an adverse impact on the employment of Hispanics.[1] The analysis I performed involved stock statistics, i.e., a comparison between the percentage of Hispanics in the workforce of each of the cities and the percentage of Hispanics in the workforce of employers in a relevant labor market (RLM).

You provided the data that I used to determine the percentage of Hispanics in the Newark and East Orange workforces, whereas Ms. Valerie J. Dion supplied the data for Bloomfield. All were based on copies of EEO-4 forms filed by the cities for a variety of "Functions" (i.e., departments or agencies). The RLM data were taken from a facsimile transmission you sent on October 16, 1996. The employment data were labeled Profile 13, and these represented total employment and Hispanic employment in Essex and Hudson Counties based on the 1990 census. These figures indicate that total employment in the two counties was 633,329, and that total Hispanic employment was 127,664. Hispanics, therefore, constituted 20.2 percent of the workforce in the two counties.

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[1] The data from a fourth township, viz., West Orange, were not suitable for analysis because they contained numerous errors. For example, it was clear that both row and column totals for section D (full-time employees) were generally incorrect.

To determine whether existing staffing procedures may have had an adverse impact on the employment of Hispanics, the Standard Deviation Rule was used. This rule is based on the standard deviation of the frequency of successes in a binomial population.[2] The Standard Deviation Rule provides a rule of thumb to judge whether or not the number of individuals representing a protected class that was actually hired is roughly representative of their proportion in the potential applicant pool, viz., the RLM.[3] Normally, a value of plus or minus 3 is used as the cutoff for assessing statistical significance.

I performed analyses for each of the three cities, and these results are presented in Tables 1 through 3. In each case, the actual number of Hispanic employees was significantly less than the number that would be expected given the level of Hispanic employment in the two counties. Because of the size of the test statistic in each case (the smallest value was 8.9), it is virtually impossible that the employment of Hispanics was a function of chance. Therefore, I must conclude that some systematic factor accounted for the underemployment of Hispanics.

Sincerely yours,

/s/ MICHAEL E. GORDON

Michael E. Gordon
Professor

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[2] A binomial population is one in which there are only two classes of observations. In generic terms, these are described as successes (e.g., a head showing after the toss of a coin) and failures (e.g., a tail showing). In this instance, the observations consist of two classes of employees, viz., Hispanic (i.e., a success) and non-Hispanic (i.e., a failure).

[3] See Robert D. Gatewood and Hubert S. Field (1990). *Human Resource Selection* (2nd ed.). Chicago: Dryden Press, pp. 41,42.

Table 1

| | |
|---|---|
| Total employees of Bloomfield | n = 346 |
| Number of Hispanic employees | nh = 3 |
| Ratio of Hispanic employment to total employment in Essex and Hudson Counties | p = .202 |
| Expected Hispanic employment in Bloomfield | np = 70 |
| Expected minus actual Hispanic employment | np - nh = 67 |
| Ratio on non-Hispanic employment to total employment in Essex and Hudson Counties | q = .798 |
| Standard deviation of frequencies in binomial distribution | s = pqn<br>s = 7.5 |
| Number of standard deviations between expected and actual Hispanic employment | (np - nh)/s = 8.9 |

Table 2

| | |
|---|---|
| Total employees of East Orange | n = 969 |
| Number of Hispanic employees | nh = 21 |
| Ratio of Hispanic employment to total employment in Essex and Hudson Counties | p = .202 |
| Expected Hispanic employment in East Orange | np = 196 |
| Expected minus actual Hispanic employment | np - nh = 175 |
| Ratio on non-Hispanic employment to total employment in Essex and Hudson Counties | q = .798 |
| Standard deviation of frequencies in binomial distribution | s = pqn<br>s = 12.5 |
| Number of standard deviations between expected and actual Hispanic employment | (np - nh)/s = 14 |

Table 3

| | |
|---|---|
| Total employees of Newark | n = 3422 |
| Number of Hispanic employees | nh = 418 |
| Ratio of Hispanic employment to total employment in Essex and Hudson Counties | p = .202 |
| Expected Hispanic employment in Newark | np = 691 |
| Expected minus actual Hispanic employment | np - nh = 273 |
| Ratio on non-Hispanic employment to total employment in Essex and Hudson Counties | q = .798 |
| Standard deviation of frequencies in binomial distribution | s = pqn<br>s = 23.5 |
| Number of standard deviations between expected and actual Hispanic employment | (np - nh)/s = 11.6 |

Supreme Court, U.S.
FILED
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(2)

No. 97-1223

IN THE

# Supreme Court of the United States

October Term, 1997

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,
*Petitioner,*

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
and
THE NEW JERSEY STATE CONFERENCE, NAACP,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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16 pp

## QUESTION PRESENTED

Respondents believe that the question petitioner seeks to present for review by this Court was not argued by petitioner to the courts below, and was not decided by them. See pages 5-6, below. Respondents believe that the only question presented for possible review by this Court is:

Whether the Court of Appeals erred in affirming without opinion the decision of the district court to deny petitioner's motion to add five (5) Essex County municipalities as parties necessary for complete relief to this Title VII suit alleging unlawful employment practices by petitioner, where petitioner had not filed a cross-claim against those five municipalities, and where the district court found them to be unnecessary for according complete relief?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

NO. 97-1223

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,
*Petitioner,*

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
AND
THE NEW JERSEY STATE CONFERENCE, NAACP,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

### JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("the Court of Appeals") was filed on October 15, 1997. The petition was served on January 13, 1998. This Court has jurisdiction under 28 U.S.C. 1254(1).

### OPINIONS AND ORDERS BELOW

The Court of Appeals affirmed without an opinion. Pet. App. 3. The Judgment Order (Pet. App. 3a) has not yet been published. The only Opinion of the district court (Pet. App. 18a-31a) was marked "Not for Publication". To the best of our knowledge that Opinion was not published, nor was any order of the district court.

## STATEMENT OF THE CASE

### A. Statement of the Basic Facts.

The material facts are not in dispute. Pet. App. 19a. The Township of North Bergen, New Jersey, is a municipality located in northern Hudson County, adjacent to Jersey City and within ten miles of Newark. Of North Bergen's 48,414 residents, approximately 2% are African-American (sometimes "black"). Hudson County has a population which is 12-14% African-American, and Jersey City has a population which is 28% to 30% African-American. North Bergen employs 410 full time employees, of whom only two(2), or less than 0.55%, are African-American. Pet. App. 19a.

North Bergen adopted an ordinance imposing a residency policy for municipal employees in 1976, and maintained that policy until decision in this case. For non-sworn positions, North Bergen requires residence in the municipality at time of application and after employment. North Bergen considers residents of other New Jersey municipalities only for the few non-sworn positions that require specialized experience or licenses not available in the resident population. Pet. App. 20a. New Jersey law prohibits municipal residency as a requirement for continued employment for firefighters and police officers. Pet. App. 21a. North Bergen's law therefore provides an absolute preference for those applicants for firefighter and police officer positions who are North Bergen residents but does not require residence after hire. The preference is granted to persons who are bona fide residents of North Bergen from the date of application until the applicants have taken and passed the examination, completed their probationary period and received appointment to the sworn position. The period of residence required for the preference may last up to five or six years. Pet. App. 22a. Each resident applicant for such positions who passes the examination is ranked ahead of all non-residents, even though the non-resident may have received a veterans preference priority or higher score on the examination. North Bergen has always had more resident applicants who pass the examination than vacancies. Pet. App. 22a. As a practical matter, therefore, the preference for residents for sworn positions acts as a requirement that applicants be residents of North Bergen. Pet. App. 21a-22a.

North Bergen's percentage of Hispanic residents has grown dramatically in recent years, and its Town Manager testified on deposition that the "recent hiring statistics reflect the increase in the number of Hispanic residents." App. of Plaintiffs-Appellees in the Court of Appeals 80.

In contrast to the less than 1% African-American work force of North Bergen employees, the full time work force of state and local government establishments located in Hudson County is 19.4% African-American. Pet. App. 19a. In North Bergen itself, the work force of private employer establishments having 100 or more employees is 8.4% African-American. *Id.*

**B. Proceedings in the District Court.**

After filing a charge of discriminatory employment practices by North Bergen with the EEOC, the NAACP and New Jersey Conference, NAACP, filed this suit on January 20, 1995, alleging that North Bergen's residency policy has a discriminatory impact against blacks and is not job related and therefore violates Title VII. Pet. App. 35a-40a. Defendant North Bergen answered and asserted affirmative defenses and counter-claimed, but did not file a cross-claim against any other municipality or anyone else. Appendix for Defendant-Appellant ("A") 16-20. North Bergen did not file a motion under Rule 14 or under Rule 19 to bring in additional parties in 1995 or in the first nine months of 1996. A4.

Plaintiffs noticed a motion for summary judgment and for a preliminary injunction on October 10, 1995. A4. In support of the motion plaintiffs submitted statistics and opinion evidence by a labor market economist that North Bergen's residence ordinance had a discriminatory impact upon the opportunities of African-Americans in the North New Jersey labor market relevant to North Bergen. In particular, the plaintiffs' evidence showed that the disparity between North Bergen's less than 1% black municipal workforce and the 8.4% black workforce of private employers located in North Bergen was 5.4 standard deviations, and that the disparity between the racial composition of North Bergen's workforce and the black proportion of state and local employees employed in Hudson County as a whole was even larger. Pet. App. 21a-29a. North Bergen did not contest the statistics except to

suggest that the count of private employees was incomplete, because only private employer establishments of 100 employees or more are included in the EEO-1 statistics compiled by the EEOC. Pet. App. 27a. North Bergen has more than 400 full time employees. See above, p. 2. North Bergen introduced no probative evidence showing that municipal residence is positively related to job performance, or that it was otherwise job related, or justified by business needs. Pet. App. 29a-32a.

By Opinion entered on March 19, 1996 (Pet. App. 18a-33a; the notation "Not for Publication" on the first page was not reproduced in the Appendix to the Petition, but is shown at A23 in the Court of Appeals). The district court granted summary judgment in favor of plaintiffs, holding that the less than 1% African-American work force of North Bergen did not occur by chance, and that the record showed no reason other than North Bergen's preference for its residents to explain the gross disparity. Pet. App. 27a-28a. The district court ruled that North Bergen's residency policy was not a lawful affirmative action policy for its Hispanic residents both because the evidence failed even to suggest discrimination by North Bergen and because the residency policy was not narrowly tailored to assist the Hispanic community. Pet. App. 31a-32a.

The district court ruled that plaintiffs' evidence showed that North Bergen's residency requirement had a racially discriminatory impact against African-Americans and that North Bergen had not produced evidence sufficient to warrant a finding that it was job related, relying upon *Newark Branch, NAACP, et al. v. Township of Harrison*, 940 F.2d 792 (3d Cir. 1991). Pet. App. 23a-32a. The district court noted in the Opinion that municipal residency preferences and requirements are not per se unlawful under Title VII, and would not be unlawful in a municipality with an "integrated population." Accordingly, the only issue raised by the law suit was whether the facts showed that North Bergen's residency ordinance operated to discriminate on grounds of race in violation of Title VII. Pet. App. 32, n. 11.

By Order entered the same day, the district court enjoined defendant North Bergen permanently from any further hiring based upon any residency preference or requirement, and preliminarily enjoined any hiring absent a showing of emergency public safety

needs, pending entry of a decree. Pet App. 15a and 16a. The Order directed the parties to attempt to agree upon a final decree, and each of them to file a proposed decree by April 16, 1996, with a supporting memorandum, if agreement was not reached on the content of the decree. *Id.* The time to file proposed decrees was extended to June, 1996, and plaintiffs and the defendant filed their proposals in that month. A53.

After its loss in the district court, North Bergen retained a different law firm and lawyers from that firm entered an appearance for North Bergen on April 11, 1996, in place of the earlier lawyers. A5. On April 24, 1996, a group of resident applicants for firefighter positions moved to intervene, and the motion to intervene was granted on July 3, 1996. A5. On June 14, North Bergen moved to add the New Jersey Department of Personnel as a party, and the district court granted the motion on July 18, 1996. A5. Thereafter the parties offered further evidence and briefs on the issue of appropriate relief. A5-6.

On October 18, 1996, North Bergen moved under Rule 19(a)(1), Fed. R. Civ. P., to join Bloomfield, East Orange, Irvington, Orange, and Newark as necessary parties. A59-60. Defendant North Bergen's Brief in Support of the Motion to Join Necessary Parties, dated October 18, 1996, argued that the joinder of the five Essex County towns was necessary "to ensure complete relief to those already parties, and to prevent discrimination against Hispanics in violation of Title VII." Quote from Table of Contents and Legal Argument, Brief in Support, pages i and 4. In that Brief, North Bergen relied upon case law under Rule 19(a). The Brief cited no cases involving racial classification or "reverse discrimination" under the Constitution or under Title VII. Id. By Order filed November 5, 1996, the district court denied the motion, on the ground that joinder of the five additional "parties is entirely unnecessary for according complete and just relief, because those parties had nothing to do with the merits of this case and need not play a role in fashioning relief." A61-62.

By Decree entered on November 20, 1996, the district court enjoined any further use of any requirement or preference based upon residency in North Bergen (Pet. App. 8a) and required advertising directed to non-residents, and record keeping and

reporting, but declined to order North Bergen to engage in recruiting directed specifically to African-American communities. Pet. App. 5a-12a.

**C. Appellate Proceedings.**

North Bergen and the applicant-intervenors filed timely notices of appeal, and plaintiffs filed a cross-notice of appeal insofar as it denied plaintiffs the relief they requested. A 74-77. The issues presented by North Bergen on appeal (Brief on Appeal for North Bergen, page 1) were:

"1. Should Summary Judgment have been granted below...?"

"2. Should *NAACP v. Harrison*, 940 F.2d 792 (3d Cir. 1991) have been followed in the ruling below..."

"3. Should the Court below have denied Defendant's motion to join other parties to implement a regional approach to remedy?"

North Bergen did not reproduce in its Appendix on Appeal the brief or exhibits filed on October 18, 1996, in support of its motion to add the five Essex County municipalities. In its argument to the Court of Appeals on Question 3, the "Reciprocity Remedy Raised by the Intervenors," North Bergen cited no case law interpreting the Constitution or Title VII on that issue and argued that the decree will create "discrimination by residency" against residents of North Bergen. Brief for Appellant in No. 96-5826 at 41-43 (quotation from p. 43).

After briefs were submitted, Paul J. Giblin, Esq., was substituted as attorney for North Bergen in the Court of Appeals, and he presented oral argument on its behalf. See file of the Court of Appeals. Oral argument was heard by the Court of Appeals on September 26, 1997. Pet. App. 31. The Court issued its Judgment Order on October 15, 1997, affirming the final Decree of the district court without Opinion. Pet. App. 3a.

## STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. 2000e et seq., provides in relevant part:

Sec. 701(m), 42 U.S.C. 2000e-(m) provides:

The term "demonstrates" means meets the burdens of production and persuasion.

Sec. 703(a), 42 U.S.C. 2000e provides in part:

(a) It shall be an unlawful practice for an employer...

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities because of such individual's race...

Sec. 703(k)(i), 42 U.S.C. 2000e-2(k)(i) provides in part:

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this Title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race...and the respondent fails to demonstrate that the challenged practice is job related for the job in question and consistent with business necessity; or...

Sec. 706, 42 U.S.C. 2000e-5(g) provides in relevant part:

(g)(1) If the Court finds that the respondent has intentionally engaged in or is intentionally engaged in an unlawful employment practice, the court may enjoin the respondent from engaging in such practice and order such affirmative action as may be appropriate....

## REASONS FOR DENYING THE WRIT

The Court of Appeals affirmed the district court decree without opinion. Pet. App. 1a-3a. It therefore made no ruling of general public importance even in the districts of the Third Circuit, but only held on the facts of this case that the district court made no error. The holding of the Court of Appeals is not in conflict with a decision of another Court of Appeals or any State court or with any decision of this Court. The only ruling on which the petition seeks review is the affirmance of the district court's order denying petitioner's motion to add necessary parties under Rule 19(a)(1), Fed. R. Civ. P. That motion was properly denied by the district court on the facts and procedural circumstances of this case. Review should be denied. Rule 10, Rules of this Court.

1. The petition does not seek review of the district court's Opinion and Order of March 19, 1996, holding North Bergen liable for its policy and practice of preferring its residents to non-residents that operates to discriminate in employment on grounds of race against African-American candidates for municipal employment in the relevant North New Jersey labor market. There would be no basis for any such review, because the district court's decision follows established precedent applying the disparate impact branch of Title VII to municipal residency preferences in employment not only in the Court of Appeals for the Third Circuit, but also the reported decisions in other circuits, even before the effective date of the Civil Rights Act of 1991 amendments to Title VII. [1] *United States v. Cicero, Illinois*, 486 F.2d 311 (7th Cir. 1986); *NAACP v. Town of Harrison, New Jersey*, 940 F.2d 792 (3d Cir. 1991); *NAACP v. Town of East Haven, Connecticut*, 70 F.3d 219 (2d Cir. 1995); *United States v. City of Warren, Michigan*, 759 F. Supp. 355 (E. D. Mich. 1992), pending on appeal, Sixth Cir. Nos. 97-1024 and 1075. [2] I Lindemann & Grossman, *Employment Discrimination Law*, (1996, ABA Section of Labor and Employment Law) Ch 6, pp. 195-196.

2a. North Bergen argues that the "remediation plan" in the Decree "mandates reverse discrimination in municipal employment against residents of the Township of North Bergen", because the Decree struck down only the residence provisions of North Bergen's ordinances, and did not strike down such provisions of

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1. The Petition cites and quotes from Sec. 703(a)(1), rather than Sec. 703(a)(2) 42 U.S.C. 2000e-2(a)(2) the subsection providing the foundation for the disparate impact branch of Title VII. Pet. 2; and *Connecticut v. Teal*, 457 U.S. 440, 448-450 (1982). While this suit was filed in 1995 and concerns conduct occurring after November, 1991, and therefore is based upon Title VII as amended by the Civil Rights Act of 1991, the decision of the district court did not rest upon any difference between Title VII before and after the effective date of those amendments, although the language of the Opinion was modified slightly to recognize that fact. Pet. App. 17a and 24a.

2. The defendant City of Warren did not take an appeal on the issue of liability, but cross-appealed only on the issue of back pay. See Brief for Warren as Appellee and Cross-Appellant in Nos. 97-1024 and 97-1075, at pp. 41-42.

five other nearby municipalities. Pet. i (Question Presented) and pp. 6-10. North Bergen relies only upon cases in which this Court and the Seventh Circuit have discussed the issue of whether and in what circumstances government conduct may be based upon a racial or national origin classification under the Constitution. [3] Those cases are inapplicable to a classification based upon municipal residence, which is constitutional unless "irrational." *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 646 (1976); *Salem Blue Collar Workers Ass'n. v. City of Salem*, 33 F.3d 265, 271 (3d Cir. 1994), *certiorari denied*, 115 S.Ct. 1105, and cases cited at 268-272. The district court correctly recognized that this case does not raise any issue of the constitutionality of the New Jersey laws authorizing residency preferences, but only concerned the application of Title VII to North Bergen's use of such a classification as a basis for employment decisions in the context of its segregated residential pattern and the diverse labor market in which it is located. Pet. App. 32a, n. 11. Accord: *Newark Br. NAACP, et al. v. Town of Harrison, supra*, 940 F.2d at 800-805.

b. North Bergen did not argue to the lower courts the constitutional question it asks this Court to review. On appeal to the Court of Appeals, North Bergen argued that the diminished municipal job opportunities for residents of North Bergen for jobs there resulting from the Decree's striking North Bergen's residence requirement without striking residence preferences of five other municipalities constituted an "obvious and gross inequity" and resulted in "unfairness" to residents of North Bergen. Br. for Appellant, pages 41-43. However, that Brief recognized that the result would be "discrimination by residency." *Id.* North Bergen did not argue to the Court of Appeals or the district court that such discrimination by residency constitutes a racial classification, or

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3. The decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943) involved the classification of American citizens by Japanese ancestry. The other cases involved the constitutionality of racial classifications or "race based" preferences by a government. *Regents of U. of California v. Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson Board of Ed.*, 476 U.S. 267 (1986); *City of Richmond v. Croson Co.*, 488 US. 469 (1989); and *Aderand Constructors Inc. v. Pena*, 515 U.S. 200 (1995); *United States v. Paradise*, 480 U.S. 149 (1987); and *Witmer v. Peters*, 87 F.2d 916 (7th Cir. 1996).

racial discrimination in violation of the Constitution of the United States or Title VII. [4] See pp. 5-6, above. The petition should be denied because the issue petitioner seeks to present was not argued to or decided by the courts below. See, *Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 551-552, n.3 (1990 Opinion of this Court), and 556 (Concurring opinion of Justices O'Connor and Scalia) and cases cited.

c. In any event, the district court's denial of North Bergen's motion to add additional parties was proper. North Bergen filed the motion under Rule 19(a)(1), which provides for the addition of a party as a matter of right only "if (1) in the person's absence complete relief cannot be accorded among those already parties." Rule 19(a), Fed. R. Civ. P. In this case, North Bergen had made no claim or cross-claim against the five municipalities or any other third party. See "Answer, Affirmative Defenses and Counterclaim" filed February 25, 1995. A4-6, A16-20. Nor did North Bergen ever serve a summons and cross-claim against a third party under Rule 14(a). Nor has North Bergen ever explained why it was necessary or proper to add five Essex County municipalities to this law suit, where the Decree only prohibits preferences based upon "residence in North Bergen" and permits North Bergen to require uniformed and other rapid response personnel to reside in an area within ten (10) miles of North Bergen. Pet. App. 8a. The district court properly ruled that the addition of the five Essex County municipalities that North Bergen sought to join on October 18, 1996, "is entirely unnecessary" as those municipalities "had nothing whatsoever to do with the merits of this case" (Pet. App. 14a) because no claim or cross-claim had been made by or against any of those municipalities by North Bergen. The denial of the motion to add five additional parties to a suit almost seven months after liability had been determined, and three months after the

4. Not one of the cases cited in the Petition in this Court was relied upon or cited by North Bergen in its Brief in the Court of Appeals (Brief for Appellant, pp. 41-43 and Table of Authorities) or in the Reply Brief portion of the Reply Brief/Response Brief, or in the district court in its brief in support. North Bergen did cite *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) in opposition to "plaintiffs' proposed remedy" in the Response Brief portion filed as cross-appellee. Reply Br./Response Br. 12.

parties had submitted their views on appropriate relief was also supported by the untimeliness of the request. See pp. 5-6, above. There was no departure from the "usual and accepted course of judicial proceedings" in this case. Compare, Rule 10(a).

## CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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